

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-

To be argued by
SUSAN N. HERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES TRACY, WILLIAM ADAMS, ROBERT ARNOLD, ARTHUR
BETSCH, SANTOS CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT HUNT, BILLY LITTLE,
LARRY MOORE, ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY REPETTI,
CORDELL ROBINSON, WILLIAM RODRIGUEZ, DENNIS SOARES,
MICHAEL THOMAS, and JOHN TURRISI, on behalf of
themselves and all others similarly situated,

Plaintiffs-Appellees,

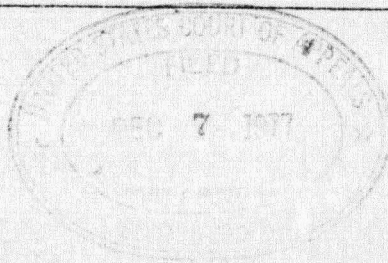
-against-

DOMINICK SALAMACK, Superintendent, Bayview
Correctional Facility; CAPTAIN HYLAN T. SPERBECK,
Correction Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department of
Correctional Services, State of New York,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES



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TABLE OF CONTENTS

	<u>Page</u>
Issue Presented for Review.....	1
Statement of the Case.....	2
Argument.....	7
POINT I - THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS-APPELLEES HAVE RAISED SUFFICIENTLY SERIOUS QUESTIONS TO MAKE THEIR CLAIMS A FAIR GROUND FOR LITIGATION..	8
A. Plaintiffs have suffered a grievous, irreparable loss of liberty and property.....	9
B. Plaintiffs have an entitle- ment to due process.....	15
1. Plaintiffs' interest in their conditional freedom is within the Fourteenth Amendment's guarantee of liberty.....	16
2. Plaintiffs had a justifiable expectation based on state law that their temporary release status would not be revoked except on certain conditions..	20
a) Justifiable expectations are created by state regulations, statements, policies, and prac- tices, as well as by statute..	20
b) Plaintiffs' justifiable ex- pectation that they would not be removed from the temporary release program is based on state law, policies, and practice.....	26

POINT II -	THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS-APPELLEES...	33
A.	Plaintiffs' interests.....	33
B.	Defendants' interests.....	34
C.	Society's interests.....	37
Conclusion.....		40

TABLE OF CASES

	<u>Page</u>
<u>Arnett v. Kennedy</u> , 416 U.S. 134 (1974).....	15
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972)...	9, 21
<u>Cardaropoli v. Norton</u> , 523 F.2d 990 (2d Cir. 1975).....	9, 11, 12, 13, 25
<u>Catalano v. United States</u> , 383 F.Supp. 346 (D. Conn. 1974).....	12
<u>Checker Motors Corp. v. Chrysler Corp.</u> , 405 F. 2d 319 (2d Cir.), cert. denied 394 U.S. 999 (1969).....	8
<u>Coralluzzo v. New York State Parole Board</u> , Dkt. No. 76-7517, slip op. 5067 (2d Cir., July 28, 1977).....	18
<u>Crafton v. Luttrell</u> , 378 F. Supp. 521 (M.D. Tenn. 1974).....	19
<u>Doran v. Salem Inn, Inc.</u> , 422 U.S. 922 (1975)....	8
<u>Durso v. Rowe</u> , 430 F. Supp. 49 (N.D. Ill. 1977)..	35
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970).....	9
<u>Goss v. Lopez</u> , 419 U.S. 565 (1975).....	15
<u>Government of United States ex rel. Shaban v. Essen</u> , 386 F. Supp. 1042 (E.D.N.Y. 1974), <u>aff'd</u> , 516 F.2d 897 (2d Cir. 1975) (table)....	19
<u>Graham v. Richardson</u> , 403 U.S. 365 (1971).....	25
<u>Hale v. Davis</u> , 387 F. Supp. 408 (W.D. Va. 1974)..	34
<u>Haymes v. Regan</u> , 525 F.2d 540 (2d Cir. 1975).....	18
<u>Holmes v. Board of Parole</u> , 541 F.2d 1243 (7th Cir. 1976).....	12
<u>Holup v. Gates</u> , 544 F.2d 82 (2d Cir. 1976).....	18
<u>In re Ballay</u> , 482 F.2d 648 (D.C. Cir. 1973).....	18, 38

	<u>Page</u>
<u>Jacobson & Co., Inc. v. Armstrong Cork Co.</u> , 548 F.2d 438 (2d Cir. 1977).....	31
<u>Lewis v. Oliver</u> , 397 F. Supp. 1204 (E.D. Va. 1975).	34
<u>McKinnon v. Patterson</u> , Dkt. No. 76-2153, slip op. 5961 (2d Cir. September 15, 1977).....	11, 25
<u>Marquez v. Warden</u> , 387 F. Supp. 565 (S.D.N.Y. 1974).	34
<u>Matter of Pannell v. Jones</u> , 36 N.Y.2d 339, 368 N.Y.S. 2d 467 (1975).....	19
<u>Meachum v. Fano</u> , 427 U.S. 215 (1976).....	9, 12, 14, 15 20-22, 24
<u>Meisel v. Kremens</u> , 405 F. Supp. 1253 (E.D. Pa. 1975).	19
<u>Montanye v. Haymes</u> , 427 U.S. 236 (1976).....	20
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	9, 10, 15-18, 25, 26, 32, 35-38
<u>Paul v. Davis</u> , 424 U.S. 693 (1976).....	15
<u>Perry v. Sindermann</u> , 408 U.S. 593 (1972).....	21, 22, 25, 26, 32, 36
<u>People ex rel. Cooper v. Smith</u> , 77 Misc. 2d 666, 354 N.Y.S.2d 572 (Wyoming Cty. Ct. 1974).....	19
<u>Polizzi v. Sigler</u> , 22 Cr. .. Rptr. 2150 (8th Cir., October 27, 1977).....	12
<u>Raia v. Arnold</u> , 405 F. Supp. 766 (M.D. Pa. 1975).....	12
<u>Roman v. Ternullo</u> , 81 Misc. 2d 1023, 367 N.Y.S.2d 197 (Dutchess Cty. Ct. 1975).....	19
<u>Sanno v. Preiser</u> , 397 F. Supp. 560 (S.D.N.Y. 1975)...	34
<u>Schumate v. People of State of New York</u> , 373 F. Supp. 1166 (S.D.N.Y. 1974).....	19
<u>Shepard v. Taylor</u> , 556 F.2d 648 (2d Cir. 1977).....	32
<u>Snyder v. Preiser</u> , 74 Civ. 5597 (S.D.N.Y. 1975) (unreported).....	19, 30
<u>Solomon v. Benson</u> , 22 Cr. L. Rptr. 2167 (7th Cir., October 6, 1977).....	12
<u>Sonesta International Hotels Corp. v. Wellington Associates</u> , 483 F.2d 247 (2d Cir. 1973).....	8, 32
<u>State ex rel. D'Jonne v. Schaen</u> , 299 Minn. 131, 217 N.W.2d 508 (Minn. 1974).....	19

<u>Triebwasser & Katz v. American Tel. & Tel. Co.</u> , 535 F.2d 1356 (2d Cir. 1976).....	7, 8
<u>United States v. Corrick</u> , 298 U.S. 435 (1936).....	8
<u>United States ex rel. Bey v. Connecticut</u> , 443 F.2d 1079 (2d Cir.), <u>vacated as moot</u> , 404 U.S. 879 (1971).....	14, 18, 35
<u>United States ex rel. Johnson v. Chairman, New York St. Bd. of Parole</u> , 500 F.2d 925 (2d Cir.), <u>vacated and remanded as moot sub nom. Regan v. Johnson</u> , 419 U.S. 1015 (1974).....	18
<u>United States ex rel. Myers v. Sielaff</u> , 381 F. Supp. 840 (E.D. Pa. 1974).....	19
<u>United States ex rel. Walker v. Mancusi</u> , 467 F.2d 51 (2d Cir. 1972), <u>aff'g</u> 338 F. Supp. 311 (W.D.N.Y. 1971).....	11
<u>Walker v. Hughes</u> , 558 F.2d 1247 (6th Cir. 1977).....	22, 23
<u>Williams v. Ward</u> , 556 F.2d 1143 (2d Cir. 1977).....	16, 18
<u>Wolff v. McDonnell</u> , 418 U.S. 539 (1974).....	10, 23, 24
<u>Zurak v. Regan</u> , 550 F.2d 86 (2d Cir.), <u>cert. denied</u> , ___ U.S. ___, 45 U.S.L.W. 3841 (U.S., June 27, 1977).	11, 18, 24, 25, 26, 32

STATUTES, REGULATIONS & AUTHORITIES

	<u>Page</u>
New York Correction Law	
§851.....	4, 5
§855(4).....	5
§855(9).....	6, 27, 28
Predecessor Statute	
§851.....	2
§851(2).....	2
§853(4).....	3, 5
§853(9).....	27
New York Executive Law §259-i(2)(c).....	39
New York Penal Law §70.40(2).....	18, 24
New York Statutes Law §52.....	6, 35
7 New York Code of Rules and Regulations §253....	30
Administrative Bulletin #12 of the New York Department of Correctional Services.....	29, 30
Friendly, <u>Some Kind of Hearing</u> , 123 U. Pa. L. Rev. 1267 (1975).....	35

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-8451

JAMES TRACY, WILLIAM ADAMS, ROBERT ARNOLD, ARTHUR
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themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

DOMINICK SALAMACK, Superintendent, Bayview
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Correction Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department of
Correctional Services, State of New York,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

Issue Presented for Review

Whether the District Court abused its discretion
in granting plaintiffs-appellees a preliminary injunction
reinstating them to the New York State temporary release
program?

a) Whether the District Court erred in finding that plaintiffs-appellees, by their assertion that they were deprived of liberty and property without due process of law, have raised sufficiently serious questions on the merits to make these claims a fair ground for litigation?

b) Whether the District Court erred in finding that the balance of hardships tips decidedly in favor of plaintiffs-appellees?

Statement of the Case

At issue on this appeal is the propriety of a preliminary injunction granted by the District Court ordering defendants-appellants to reinstate to the New York State temporary release program 140 persons who had been participating in the program, but were summarily prohibited from further participation by defendants' actions on August 25, 1977.

The New York State temporary release program, as described in appellants' brief, has been in existence since 1969. New York Correction Law §§851 et seq. Under the statutory scheme in effect before September 1, 1977, any inmate within one year of eligibility for parole could apply for participation in the temporary release program. Id. §851(2). The officials reviewing such applications were required by the statute to determine whether each applicant's participation

in the program was consistent with the safety of the community and in the best interests of rehabilitation of the inmate. N.Y. Correction Law §853(4) (McKinney's Supp. 1976-77).

Pursuant to this statute, each of the 140 members of the plaintiff class^{*} herein applied for the temporary release program, and received approval from all relevant officials some time prior to August, 1977. Each of these plaintiffs was transferred to a facility designated as a work release facility, and sought employment or educational opportunities. See Joint Appendix (hereinafter cited as "JA"] at 45-47, amended complaint ¶¶27-38.^{**} After being approved for temporary release, each participant in the program signed a memorandum of agreement, or contract between the temporary release participant and the state, wherein the participant agrees to be bound by certain terms

* The motion for preliminary injunction was made on behalf of a class of approximately 140 persons, defined as those persons who were removed from the temporary release program on or about August 25, 1977. See JA at 30,45. No motion for certification of the class was made, in light of defendants' agreement to afford any relief the Court granted to all persons in the class as defined. This agreement was suggested by the District Court to avoid the delay which would have been caused by a formal motion for class certification.

** Neither the personal circumstances of the plaintiffs as alleged in the complaint, nor any other facts relevant to the District Court's decision, have ever been disputed by defendants-appellants. Indeed, the District Court provided numerous opportunities for defendants to rebut plaintiffs' assertions, or to present evidence, even specifically inquiring whether defendants were satisfied with the factual record before the Court, or whether they desired further hearings. No such hearing was requested. See JA at 83-84.

and conditions governing his behavior while on temporary release. (See JA at 64-68 for samples of these memoranda of agreement.) According to appellants, approximately 70 of these plaintiffs had found jobs and begun work by August, 1977. Appellants' brief at 3 n. The plaintiffs who had located jobs had been attending their jobs regularly, performing to the satisfaction of their employers, and receiving salaries for periods of months or, in some cases, for as long as a year. JA at 34, affidavit in support of preliminary injunction ¶¶10-11; JA at 46, amended complaint ¶¶31-33. Other members of the plaintiff class were scheduled to begin work in August or September, 1977; others were actively seeking employment; and still others were scheduled to begin college in September, 1977. JA at 46-47, amended complaint ¶¶ 34-37.

Effective September 1, 1977, the New York State Legislature reenacted the temporary release laws, with minor amendments. See JA 5-12. The legislature provided, in §851(2) as amended, that inmates who had been convicted of escape or absconding would no longer be eligible for participation in the temporary release program, and reiterated the requirement that any inmate must be within one year of parole eligibility in order to be eligible for participation in the program. See JA at 5. These were the only amendments affecting eligibility for the program. The legislature also provided that inmates who are otherwise eligible, and who

are under sentence for certain specified crimes must receive written approval from the Commissioner of the New York State Department of Correctional Services, in order to participate in the program, and instructed the Commissioner to promulgate regulations to carry out this mandate. Id., §851(2), JA at 5.

The criteria for reviewing applications for the program remained essentially the same under the new statute. In §855(4), the legislature specified again that the standard to be applied in reviewing applications is whether the applicant's participation in the program is consistent with the safety of the community (compare §853(4) of the statute before amendment), and consistent with the "welfare of the inmate" (compare §853(4) of the statute before amendment). JA at 9. Thus, except for inmates who had been convicted of escape or absconding, the statute did not render any inmate ineligible for participation in the temporary release program. The amendment only states that the Commissioner must approve certain applicants whereas, under the former statute, some of those applicants would not have needed to seek personal approval from the Commissioner if they had gained approval from the Temporary Release Committee and/or the Superintendent at their respective institutions. Only the identity of the decisionmaker, and not the nature of the decision, was changed by the new statute.*

*Not even the identity of the decisionmaker was changed in all cases. Throughout the history of the temporary release program, defendants have used "special review" procedures to afford additional consideration of applicants with backgrounds considered to warrant particular concern. The categories of persons who must receive special review have varied, but included at least one of the plaintiffs herein, who received approval of his temporary release application from a deputy commissioner in Albany pursuant to the special review program. See JA at 73.

Nowhere does the statute specify that any new provisions are to be applied to persons already approved and participating in the program. The fair implication of the statute is that any new criteria are to be applied prospectively to persons applying for temporary release after the effective date of the statute.* Another amendment to the statute specifies that an inmate's participation in a temporary release program is to be revoked "in accordance with regulations promulgated by the commissioner." §855(9), JA at 10.

During August, before the effective date of the statute, without having promulgated the required regulations governing revocation, and without providing any notice or hearings, Commissioner Ward and his agents reviewed the records of persons already approved and participating in the temporary release program and summarily removed 140 persons from the program. None of these 140 persons was charged with any form of misbehavior or failure to comply with any of the conditions of his temporary release. JA at 12-13, amended complaint ¶¶ 42-46. No explanation of the grounds for these decisions was provided.

Since August 25, 1977, these men have been prohibited from attending their jobs or schools, and have been suffering an irreparable loss of liberty, property, valuable training and experience, and the opportunity to

* See New York Statutes Law §52 (McKinney's 1971), stating that under New York law, statutory amendments will have only prospective application unless the language of the statute clearly indicates that it is to be applied retroactively.

begin the process of reintegration into society. Because of the requirement that these plaintiffs had to be within one year of parole eligibility to be approved for temporary release prior to August, 1977, see p. 2 , supra, those members of the plaintiff class who are still confined will be eligible for release on parole within the next eight to nine months, at most. In fact, appellants state that only 77 persons now remain within the plaintiff class, due to the fact that the Parole Board consistently has been releasing these plaintiffs on parole. Appellant's brief at 12 n.

ARGUMENT

After nine conferences, several of which were attended personally by defendant Ward and his agents, numerous submissions of legal memoranda, and review of pertinent statutes, regulations, documents and affidavits, the District Court concluded that plaintiffs-appellees had met the criteria for issuance of a preliminary injunction. The Court found, first, that "the balance of hardships in this case tips decidedly in favor of the participants in the temporary release program" (JA at 95, opinion at 2), and, second, that plaintiffs had raised questions sufficiently serious to create a fair ground for litigation. (JA at 95-96, 102, opinion at 2-3, 9). The legal standard applied by the District Court is unquestionably correct. See Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1358

(2d Cir. 1976); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

Because the decision whether to grant a preliminary injunction lies within the sound discretion of the District Court, the question on this appeal is whether the District Court abused its discretion. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); United States v. Corrick, 298 U.S. 435, 437-48 (1936); Triebwasser, supra at 1358; Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999 (1969).

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT PLAINTIFFS-APPELLEES HAVE RAISED SUFFICIENTLY SERIOUS QUESTIONS TO MAKE THEIR CLAIMS A FAIR GROUND FOR LITIGATION.

By removing 140 persons from the temporary release program, defendants-appellants effectively revoked a highly desirable status which had been conferred upon plaintiffs, and thereby deprived plaintiffs of liberty and property without due process of law. As the District Court found, the question of whether procedural protections are due before a previously conferred governmental benefit may be revoked depends not on whether the benefit is labeled a right or privilege but on

the extent to which an individual will be 'condemned to suffer a grievous loss.' . . . The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of of the Fourteenth Amendment.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see Meachum v. Fano, 427 U.S. 215 (1976); Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Cardaropoli v. Norton, 523 F.2d 990, 995 n. 11 (2d Cir. 1975). See JA at 96, opinion at 3. The District Court did not err in finding that plaintiffs have raised a strong claim that they have suffered a grievous loss, and also that they have an entitlement to due process under the Fourteenth Amendment.

A. Plaintiffs Have Suffered a Grievous, Irreparable Loss of Liberty and Property.

Because they have been prohibited from participating in the temporary release program from August 25, 1977 until the present, plaintiffs herein have suffered an enormous, incalculable loss of both freedom and wages, a loss which can only be characterized as grievous. That a loss of liberty is grievous, even though the liberty be conditional, was conclusively established in Morrissey v. Brewer, supra, where the Supreme Court held that parolees are entitled to due process protections before their parole may be revoked.

In reviewing the interest of the parolees, the Court found that

the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others.

Id. at 482.

The conditional liberty enjoyed by temporary release participants is fully comparable to that afforded parolees. The temporary release participant may spend up to fourteen hours per day outside of prison; may maintain a job, earn a salary, gain experience and training; may form associations and relationships in the outside world; and may enjoy many other "core values" of liberty not available inside prison. The only substantial difference in status between a parolee and a temporary release participant is that the temporary release participant is required to return to a work release facility each night. In fact, as the District Court found, "even this distinction is not overwhelming since overnight and weekend furloughs are commonly available [to temporary release participants]." JA at 97, opinion at 4.

Since Morrissey, the Supreme Court and this Court consistently have found that any loss of conditional freedom, in its various forms, constitutes a "substantial deprivation" or a grievous loss. See Wolff v. McDonnell, 418 U.S. 539

(1974) (loss of good time credit resulting in delay in conditional release constitutes a grievous loss); McKinnon v. Patterson, Dkt. No. 76-2153, slip op. 5961, 5973-78 (2d Cir., September 15, 1977) (possibility of two weeks in keeplock is a substantial deprivation); Zurak v. Regan, 550 F.2d 86 (2d Cir.), cert. denied, ___ U.S. ___, 45 U.S.L.W. 3841 (U.S., June 27, 1977) (conditional release); United States ex rel. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972), aff'g 338 F. Supp. 311, 314 (W.D.N.Y. 1971) (confinement to a segregated housing unit is a substantial deprivation, see McKinnon, supra at 5975-76).

In Cardaropoli, supra, this Court ruled that designation as a "Special Offender" inflicts a grievous loss upon federal prisoners, and may not be imposed in the absence of the basic elements of due process. Id., 523 F.2d at 995. Designation as a Special Offender does not directly affect an inmate's freedom. Rather, the designation delays or precludes inmates' opportunities to participate in certain prison programs: "social furloughs, work release, transfer to Community Treatment Centers, and the opportunity for early parole." Id. at 994. The Court found these programs to be "cognizable benefits . . . eagerly solicited and received by the inmates [which] obviously play a meaningful role in enhancing rehabilitation, reducing frustration, maintaining morale, and minimizing unrest in

the prison setting." Id. at 994-95, quoting Catalano v. United States, 383 F.Supp. 346, 351 (D. Conn. 1974). In concluding that the inmates' interest in eligibility for these programs mandated due process protection the Court stated:

The Special Offender classification works serious alteration in the inmate's conditions of confinement because it hinders or precludes eligibility for these important rehabilitative programs. We therefore conclude the marked changes in the inmate's status which accompany the designation create a grievous loss.

Id. at 995 (footnote and citation omitted). See also Raia v. Arnold, 405 F.Supp. 766 (M.D. Pa. 1975).*

The grievous loss in Cardaropoli was loss of eligibility for programs, including a work release program. If denial of eligibility to apply for the work release program constitutes a grievous loss within the meaning of the Fourteenth Amendment, revocation from the work release program must as well. The interest protected in Cardaropoli

* The Eighth Circuit, following Cardaropoli, recently found that designation as a special offender and the concomitant restrictions on freedom to participate in rehabilitative programs, constitutes a deprivation of liberty within the meaning of the Fourteenth Amendment. Polizzi v. Sigler, 22 Cr. L. Rptr. 2150 (8th Cir. October 27, 1977). The Court ruled that the rationale of Cardaropoli is not impugned by the Supreme Court's subsequent decision in Meachum, supra, because the "unique constraints" suffered by special offenders are distinguishable from the inter-prison transfers found by the Meachum Court to be "within the normal limits or range of custody which the conviction has authorized the State to impose." Polizzi, supra at 2151, quoting Meachum, supra at 225. The Seventh Circuit, which had decided in Holmes v. Board of Parole, 541 F.2d 1243 (7th Cir. 1976) to follow Cardaropoli, has overruled itself. Solomon v. Benson, 22 Cr. L. Rptr. 2167 (7th Cir., October 6, 1977).

is a possibility that, after a due process hearing, an inmate might not be designated as a Special Offender, might therefore be eligible to apply for a program such as work release, might subsequently be accepted into the program, and might thereafter find a job and participate in the program. The plaintiffs herein were eligible for the work release program, applied, were accepted, found employment or opportunities for training, and, in many instances, were receiving pay. Their loss is far more certain and far more grievous than that considered in Cardaropoli.

In addition to a substantial loss of freedom, plaintiffs herein have suffered severe financial losses. For almost four months, they have been deprived of the opportunity to earn salaries far greater than prison wages.* These lost wages amount, for many of the plaintiffs, to thousands of dollars -- certainly a grievous matter for persons who have only meager financial resources, and who have been or will be facing release on parole without sufficient savings to meet the many expenses entailed in

* Work release participants are paid by their employers, and the salaries earned by plaintiffs herein ranged from \$100 to \$300 per week. JA at 46, amended complaint ¶32. Wages paid to inmates for their work inside prison generally amount to between \$0.25 and \$1.15 per day.

release from prison.

Further, having been denied the opportunity to attend work or school, many of the plaintiffs have lost their jobs or school placements, and all have lost invaluable training and experience. Indeed, revocation from temporary release, and the concomitant loss of jobs and experience may even adversely affect plaintiffs' chances of being released on parole. See United States ex rel. Bey v. Connecticut, 443 F.2d 1079, 1087 (2d Cir.), vacated as moot, 404 U.S. 879 (1971). Parole decisions are based, in part, on an inmate's employment prospects. Participation in the temporary release program, and the availability of employment, thus enhance both the likelihood that the participant will be released on parole, and his prospects of succeeding on parole.

These substantial losses of freedom, property, and future opportunities can hardly be equated with the slightly "more disagreeable" conditions of confinement at issue in Meachum, supra. See Appellants' brief at 17-18. In light of the enormous injury inflicted upon plaintiffs, and prior case law in this area, the District Court did not err in finding that plaintiffs have suffered a grievous loss, or in finding that plaintiffs will continue to suffer irreparable injury in the absence of injunctive relief.

B. Plaintiffs Have an Entitlement to Due Process.

In Meachum, supra, the Supreme Court reiterated the statement in Morrissey, supra at 481, that not every grievous loss visited upon a person by the state is sufficient to invoke the protections of the Due Process Clause. It is the nature, and not only the weight of the interest involved, which determines whether due process attaches. The Meachum Court held that a prisoner's interest in not being transferred from one institution to another did not command due process protection merely because conditions in the second prison were more disagreeable. Id. at 225. To command protection under the Fourteenth Amendment, the interest involved must be "one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Morrissey, supra at 481. The Supreme Court ruled in Meachum that a constitutional entitlement to due process may have one of two sources: it may originate in the Constitution itself, or it may have its roots in state law. Id. at 223-26, see also id. at 230 (Stevens, J., dissenting); Paul v. Davis, 424 U.S. 693, 711 n. 5 (1976).^{*} Under either of these theories, plaintiffs have raised a strong claim of entitlement to due process.

^{*} See also Goss v. Lopez, 419 U.S. 565, 574 (1975); Arnett v. Kennedy, 416 U.S. 134, 157 (1974), where the Supreme Court indicated that although property interests must find their origins elsewhere, liberty interests are directly grounded in the Due Process Clause. At issue in those cases was a lesser liberty interest in preserving reputation, not freedom itself. See Arnett, supra.

1. Plaintiffs' Interest in Their Conditional Freedom Is Within the Fourteenth Amendment's Guarantee of Liberty.

The temporary release participant's interest in his conditional freedom, by its very nature, is one within the contemplation of the Fourteenth Amendment's guarantee of liberty. Supreme Court and Second Circuit case law demonstrates that liberty interests occupy a favored position within due process analysis. Because of the unique and precious nature of an individual's interest in his freedom, the courts consistently have held that any decision threatening freedom, whether the freedom be absolute or conditional, must be preceded by due process.

In Morrissey, supra, the Supreme Court found that parolees have an entitlement to due process before their parole is revoked, both because termination of parole inflicts a grievous loss, and because "[b]y whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." Id., 408 U.S. at 482; see Williams v. Ward, 556 F.2d 1143, 1155 (2d Cir. 1977). As described above, at pp.9-10, supra, the temporary release participant enjoys virtually all of the "core values of unqualified liberty" the Morrissey Court found determinative. In fact, if the words "temporary release" are substituted for the word "parole," the description of the interest in Morrissey, supra at 482, applies almost precisely to the situation of temporary release participants:

"The [temporary release participant] has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person."

"Subject to the conditions of his [status], he can be gainfully employed..."

The temporary release participant is free to associate with nonprisoners, and to form enduring business and personal contacts.

"Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement" as a non-participant in the program.

The temporary release participant may have been employed or attending school for a lengthy period of time, and may be leading a relatively normal life at the time he is faced with revocation.

The temporary release participant "has relied on at least an implicit promise that [temporary release status] will be revoked only if he fails to live up to the [conditions imposed]."

If the interest in conditional freedom in Morrissey warranted due process protection because of its nature, the analogous interest herein is equally within the Fourteenth Amendment's ambit, as the District Court has found. JA at 97, opinion at 4.

An unbroken line of cases in this Circuit demonstrates that conditional liberty in any form is entitled

to special protection under the Due Process Clause. The Second Circuit, which held even before Morrissey that parolees are entitled to due process prior to parole revocation, see Bey, supra, has extended the principles of Morrissey to the initial parole decision, on the reasoning that a prisoner's interest in his conditional freedom is the same in either case, and is of decisive importance. See Coralluzzo v. New York State Parole Board, Dkt. No. 76-7517, slip op. 5067, 5071 (2d Cir., July 28, 1977); Williams v. Ward, supra, 556 F.2d at 1158; Holup v. Gates, 544 F.2d 82 (2d Cir. 1976); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); United States ex rel. Johnson v. Chairman, New York St. Bd. of Parole, 500 F.2d 925, 928 (2d Cir.), vacated and remanded as moot sub nom. Regan v. Johnson, 419 U.S. 1015 (1974).

In Zurak v. Regan, supra, this Court held that a prisoner's interest in the conditional release program established by New York Penal Law §70.40(2) also is entitled to due process protection, again focusing on the nature of the interest at stake: conditional freedom versus incarceration. Id., 550 F.2d at 92-93.

Many other courts have extended this analysis to protect various forms of conditional liberty, at both the revocation and initial decisionmaking stages. See In re Ballay, 482 F.2d 648 (D.C. Cir. 1973) (due process

protections in civil commitment proceedings); Meisel v. Kremens, 405 F.Supp. 1253 (E.D. Pa. 1975) (due process required before revocation of long-term leave of state mental patient); Government of United States ex rel. Shaban v. Essen, 386 F.Supp. 1042 (E.D.N.Y. 1974), aff'd, 516 F.2d 897 (2d Cir. 1975) (table) (due process required before revocation of "after-care" status of drug addicts). United States ex rel. Myers v. Sielaff, 381 F. Supp. 840 (E.D. Pa. 1974) (due process required in procedures used to determine eligibility for community treatment programs); Matter of Pannell v. Jones, 36 N.Y.2d 339, 368 N.Y.S.2d 467 (1975) (due process required before revocation of "after-care" status of drug addicts).

Indeed, a number of federal and state courts have examined the precise interest at stake herein -- participation in a temporary release program -- and have concluded that temporary release participants have an entitlement to due process based on the nature of their interest. See Crafton v. Luttrell, 378 F.Supp. 521 (M.D. Tenn. 1974); Schumate v. People of State of New York, 373 F.Supp. 1166 (S.D.N.Y. 1974); Snyder v. Preiser, 74 Civ. 5597 (S.D.N.Y. 1975) (unreported); State ex rel D'Jonne v. Schaen, 299 Minn. 131, 217 N.W. 2d 508 (Minn. 1974); Roman v. Ternullo, 81 Misc. 2d 1023, 367 N.Y.S.2d 197 (Dutchess County Ct. 1975); People ex rel. Cooper v. Smith, 77 Misc. 2d 666, 354 N.Y.S. 2d 572 (Wyoming County Ct. 1974).

In light of these precedents affording special consideration to liberty interests, plaintiffs' interest in the conditional liberty they enjoyed as participants in the temporary release program must certainly be viewed as within the Fourteenth Amendment's guarantee of liberty.

2. Plaintiffs Had a Justifiable Expectation Based on State Law, That Their Temporary Release Status Would Not Be Revoked Except on Certain Conditions.

In Meachum, supra the Supreme Court explained that even if an interest is not directly within the contemplation of the Fourteenth Amendment, the interest may nevertheless command the protection of the Due Process Clause if the person enjoying the interest has some "right or justifiable expectation rooted in state law" that he will continue to enjoy that interest unless and until some specific event occurs. Montanye v. Haymes, 427 U.S. 236, 242 (1976); see Meachum, supra at 223-26. Under this recently articulated theory a benefit conferred by the state may not be arbitrarily abrogated if the state has led the person enjoying the benefit to believe that it will not be arbitrarily abrogated.

a) Justifiable expectations are created by state regulations, statements, policies and practices, as well as by statute.

The theory set forth in Meachum and Haymes is of recent origin, so there is only a modicum of case law

discussing the question of how a "right or justifiable expectation rooted in state law" is gauged. However, because the Meachum standard is derived from cases analyzing whether property interests exist, prior case law provides some benchmarks.

Cases decided before and after Meachum demonstrate that the question of whether a justifiable expectation has been created by state law is a factual question, see JA at 84, to be determined by reference to the state's actual policies and practices. In Board of Regents v. Roth, supra, the Supreme Court explained that a property interest may be created by state law if there exist "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id., 408 U.S. at 577. In Perry v. Sindermann, 408 U.S. 593 (1972), the Court held that rules or understandings giving rise to a property interest need not be set forth in writing. Sindermann, a teacher at a state college challenging his termination, had no tenure provision in his contract, and thus had no explicit guarantee of any right to continued employment. The Supreme Court nevertheless found that Sindermann could not be terminated from employment without due process if he could establish that the college had a "de facto tenure program." Id. at 599-600. The Court explained that the absence of an explicit contractual

provision "may not always foreclose the possibility that a teacher has a 'property' interest in reemployment." Id. at 601. The Court analogized Sindermann's claim of entitlement to an implied contract, stating that "[e]xplicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in light of the surrounding circumstances.' . . . [a]nd, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.'" Id. at 602 (citations omitted). Thus, the teacher was found to have stated a constitutional claim by alleging "the existence of rules and understanding, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement. . . ." Id. at 602.

In Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977), a case decided after Meachum, the Sixth Circuit explored the question of how a justifiable expectation is created within the context of a statutorily-based governmental program. The court concluded that a liberty interest may be created by governmental policy guidelines, statements and regulations, as well as by statute. At issue in Walker was whether certain federal prisoners had a right to due process before being punished by transfer to maximum security institutions, inter alia. The Sixth Circuit recognized that under Meachum, supra, the interest asserted was not directly within the protection of the Due Process

Clause as an aspect of liberty. The court also found that "the relevant federal statutory provisions, because they grant discretionary authority to prison officials, do not themselves create any liberty interest." Id. at 1252-53. However, the court also found that "the federal statutory provisions granting discretionary authority to prison officials do not stand alone." Id. at 1254.

Because due process analysis of liberty has paralleled that of property, Wolff v. McDonnell, supra, 418 U.S. at 557-58. . . Liberty interests can be created by rules or mutually explicit understandings. The present case is analogous to Perry [v. Sindermann, supra], because the policy statements issued by prison officials can be read into the statutory grant of authority to prison officials.

Id. at 1255-56. The court went on to hold that the prisoners had a justifiable expectation, created by executive policy statements promulgated pursuant to the statute, that they would not be transferred to maximum security institutions "except upon a finding of major misconduct by the Adjustment Committee," id. at 1256, and held that the Adjustment Committee must afford the procedural rights set forth in Wolff, supra in determining whether such misconduct has occurred.

The Second Circuit has also, at least implicitly, accepted the theory that a justifiable expectation may be created by state law even where the governing statute

purports to make decisions discretionary. In Zurak v. Regan, supra at 92-93, the Court found that New York Penal Law §70.40(2) provides inmates a "justifiable expectation rooted in state law" that they will be conditionally released if they meet certain standards. This finding was made despite the fact that the statute specifies that an inmate "may" be released if he so requests and fulfills certain conditions, and that "conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board, in accordance with the provisions of the correction law." Id. (emphasis added) The Zurak Court obviously looked to more than the governing statute before reaching the conclusion that inmates who met parole board standards had a justifiable expectation of being released, and an entitlement to procedural protections.*

The message of these cases is twofold. First, these cases show that the way in which a program actually has been administered can create a justifiable expectation

* Similarly, in Wolff v. McDonnell, supra, a case declared by Meachum to provide an example of a state-created expectation, see id., 427 U.S. at 225-26, the Supreme Court examined the entire scheme of state statutes and prison regulations pertaining to the good time credit program and its administration before concluding that state law had created an entitlement to due process. Wolff, supra, 418 U.S. at 544-53. The Court ruled that Nebraska prisoners lost good time credit only if they were found guilty of serious misconduct, and stated that therefore, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the States must be observed." Id. at 558.

even where the statute governing the program, taken alone, might not. The approach of reviewing the entire administration of a governmental benefit rather than simply relying on the language of the statute providing the benefit, is mandated by the Supreme Court's rejection of the antiquated "right-privilege" doctrine. See Morrissey, supra at 481; Graham v. Richardson, 403 U.S. 365, 374 (1971); see also Cardaropoli, supra, at 995 n. 11. If the government may insulate its decisions by merely announcing that all decisions are discretionary, the right-privilege distinction has been revived, and the government's labels become dispositive. For the purposes of due process analysis, the individual interest at stake, not the government's nomenclature, must be paramount. See McKinnon, supra at 5975. Thus, as in Perry v. Sindermann, supra, expectations created and fostered by implicit promises made to an individual, must be viewed as giving rise to a justifiable expectation that a benefit conferred will be revoked only under such conditions as that individual has been led to expect.

Further, Zurak demonstrates that in certain circumstances the manner in which a program has been administered can create substantive as well as procedural limitations on governmental discretion. The Zurak Court found that prisoners who applied for conditional release had a justifiable expectation of actually being released

if they met certain conditions -- not just that they would receive hearings. Id. at 92. Plaintiffs herein were led to and did expect that they would not be removed from the temporary release program on the basis of criminal history information which was known to defendants and reviewed by defendants during the initial eligibility decisions. As in Morrissey, Sindermann, and Zurak, if plaintiffs were justifiably led to rely on this implicit promise, the State may be bound to honor that promise.

b) Plaintiffs' justifiable expectation that they would not be removed from the temporary release program is based on state law, policies and practices.

After reviewing the relevant statutes, regulations, related documents, and statements by defendants-appellants, the District Court found, as a matter of fact, that "a [temporary release] participant did have a reasonable expectation, arising from the practice of the state itself, of a right to continued participation in the program so long as he did not commit an offense within the letter or spirit of the [memorandum of] agreement" and therefore concluded that participants "cannot be deprived of this entitlement without appropriate and due process." JA at 101, opinion at 8. In addition to deriving support from the pertinent statutes, regulations and policy statements, the District Court's conclusions

relied on defendants' concession that their policy and practice under the temporary release program led defendants themselves, as well as plaintiffs, to expect that plaintiffs would continue in the program for so long as they did not violate any of the terms and conditions imposed upon them. See JA at 101, opinion at 8; JA at 77-78.

The statute governing the temporary release program does not set forth grounds for revocation. The statute and form memoranda of agreement provided to temporary release participants recite that participation in the program is a privilege which may be revoked. N.Y. Correction Law §855(9) (as amended), JA at 10; N.Y. Correction Law §853(9) (McKinney's Supp. 1976-77); JA at 64-68 (memoranda of agreement). Plaintiffs have agreed that participation in the program is revocable, after a finding of misbehavior.* As the District Court found (JA at 97-100, opinion at 6-8), the statement that participation in the

* Temporary release status historically has been revoked for violation of the terms and conditions of the memorandum of agreement each participant signs, for criminal conduct, or for violation of institutional rules. At several conferences, defendants explained that revocation may also be predicated upon changes of circumstances other than misbehavior -- for example, if a participant became disabled and could no longer perform his job, he might be subject to revocation. JA at 80. The District Court characterized the grounds for revocation as always involving "something that either the participant committed or that occurred with regard to his personal status." JA at 82. The common element in all grounds for revocation effective before August 25, 1977, was some sort of change in circumstances regarding a participant's conduct in the program. The term "misbehavior" is used in this brief as a convenient term for referring to such changes in circumstance.

program is revocable must be read in context, and is most naturally interpreted, in light of the accompanying text, as meaning that removal from the program will occur only following violations of the terms and conditions by which temporary release participants are bound. (See JA at 76-77 for the District Court's fuller explanation of its construction of these provisions.) The statute simply does not provide for continual reappraisals of the eligibility of persons already participating in the temporary release program. The statute does provide that revocations are to be "in accordance with regulations promulgated by the commissioner." Id., §855(9), JA at 10. Because no such regulations have been promulgated, no guidance is provided by this instruction either. Thus, the grounds for revocation are not explicitly set forth, and can only be judged by defendants' past practices.

Both the temporary release law in effect at the time plaintiffs were approved for the program and the law as now amended provide the same criteria for reviewing applications: whether a temporary release program for the applicant is consistent with the safety of the community, and with the best interests of the applicant. See p. 5, supra. Because each plaintiff had received approval, each therefore could reasonably expect that his release had been

deemed consistent with the safety of the community. It is certainly reasonable to assume that a finding, on the basis of an inmate's criminal record, that his release poses no substantial danger to the community, will be reexamined only if new information relevant to this decision becomes available -- for example, if the inmate misbehaves in some way indicating that he may pose a danger to the community. Thus, each plaintiff had already been assured that, based upon his record, his release was consistent with the safety of the community, and therefore could justifiably expect that he would not be subject to revocation unless he misbehaved. The amendments to the statute, which left the eligibility requirements and the applicable criteria the same as to the plaintiffs herein, see p. 5 supra did nothing to require that this expectation be disappointed.

Executive policy statements and regulations promulgated under the statute also fostered the justifiable expectation that removal from the program will be predicated only on misbehavior, and will be preceded by a due process hearing. In an Administrative Bulletin defining the policies and procedures governing the temporary release program, former Commissioner Oswald stressed the rehabilitative nature of the program, and further stated:

14. Removal of an inmate from the work release program and other disciplinary actions shall be consistent with the provisions of Sections 853.8, 854.3 and 854.4 of Article 26 of the Correction law. The decision to terminate an inmate's participation in a work release program shall only be taken after a prompt and fair hearing conducted by the Temporary Release Committee.

JA at 72 (emphasis added).

Since this statement was made, temporary release participants subject to revocation have been afforded Superintendent's Proceedings pursuant to 7 N.Y.C.R.R. §253, which authorizes "temporary or permanent change of program" as a disposition which may be made at such disciplinary proceedings. See Snyder v. Preiser, supra, opinion at 11-13 (concluding that the procedures applicable at Superintendent's Proceedings govern temporary release revocations).

Finally, as the District Court found, the policy and practice of the State, since the inception of the temporary release program, has been to revoke temporary release status only for misbehavior. JA at 101, opinion at 8. This finding was based, in part, on defendants' concession that defendants, as well as the temporary release participants themselves, expected the plaintiffs to continue in the program absent a specific violation. See JA at 101, opinion at 8; JA at 77-78. In the face of numerous opportunities and invitations by the District Court, see, e.g., JA at 78-84, defendants never sought to submit evidence, and never even

asserted, that any temporary release participant had ever been removed from the program for any reason other than misbehavior, or a change of personal circumstances (as described at p. 27 n., supra). Thus, the District Court's finding is supported not only by defendants' concessions, but also by defendants' utter failure to rebut plaintiffs' allegations about the policies and practices surrounding the temporary release program. See JA at 44-45, amended complaint ¶25; JA at 123-124, affidavit in opposition to motion to alter or amend ¶¶3, 5 & 6.*

Furthermore, if the phrase "justifiable expectation" derives any content from the natural meaning of the words, plaintiffs' claim of entitlement is further bolstered by the fact that plaintiffs were led to believe, on a personal level, that their continuation in the temporary release program was contingent only upon their own behavior. Defendants have never contested that these individuals were complying with all of the terms and conditions imposed upon them, and were performing to the satisfaction of their employers. Each plaintiff had signed a memorandum of agreement, and thereby had entered into a contract with the state. Each therefore had every reason and right to expect that, because he had upheld his part of the temporary release agreement, he would not be summarily prohibited from continuing

* "Defendant did not request an evidentiary hearing below and therefore 'cannot be heard to complain' that a hearing was not conducted." Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 442 (2d Cir. 1977) (citations omitted) See p.3 n. supra.

to work.*

On the basis of this record, the District Court had ample support for concluding that each plaintiff had a "reasonable expectation, arising from the practice of the state itself, of a right to continued participation in the program so long as he did not commit an offense within the letter or spirit of the agreement." JA at 101, opinion at 8. As in Morrissey, supra, plaintiffs had been implicitly promised that their favored status would not be revoked absent their own misbehavior. As in Sindermann, supra at 602, "rules and understandings, promulgated and fostered by state officials . . . justify [their] legitimate claim of entitlement." And as in Zurak, supra, procedural protection alone would not be enough to mitigate the denial of due process plaintiffs have suffered.

Therefore, plaintiffs-appellees have made a strong showing of probable success on the merits and, at the very least, have raised sufficiently serious questions to make their claims a fair ground for litigation. See Sonesta, supra.

* Cf. Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977) ("Whatever our current attitude may be toward the wistful ideal of 'rehabilitation,' see Kaufman, Book Review, 90 Harv. L. Rev. 1052 (1977), it is unjust and offends fair play retroactively to increase the punishment of a 'model prisoner' merely because of Congress's belated and changed mood concerning the proper response to juvenile crime." Id. at 654 [citation omitted]).

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN FAVOR OF PLAINTIFFS-APPELLEES.

The balance of hardships in this case is clearly as the District Court found it to be. JA at 95, opinion at 2.

A. Plaintiffs' Interests

For nearly four months, plaintiffs-appellees have been deprived of the opportunity to attend their jobs, to attend school, and to enjoy a semblance of free and normal life. As described above, pp.9-10 supra, plaintiffs have already endured an enormous loss of liberty, wages, and opportunities for the future. Each day that passes exacerbates these injuries. As time passes, it becomes increasingly unlikely that plaintiffs' former employers will be able to hold plaintiffs' jobs available. See JA at 35, affidavit in support of preliminary injunction ¶12. Those plaintiffs who were scheduled to begin college in September have already forfeited the fall semester, but may be able to begin study in January, if prompt injunctive relief is afforded. The deprivations plaintiffs have been suffering may well affect not only future parole decisions,

but also the likelihood that plaintiffs will be able to muster the employment prospects, work experience, and financial resources to succeed after they are paroled. It is no exaggeration to state that loss of this rehabilitative program may affect the course of many lives.

B. Defendants' Interests

As the District Court found, the administrative burden involved in reinstating plaintiffs to the temporary release program palls in significance when measured against plaintiffs' grievous loss of liberty and property. See JA at 95, opinion at 2.

The chief interest defendants-appellants invoke is their right to make discretionary decisions concerning eligibility for the temporary release program. Plaintiffs-appellees do not challenge defendants' authority to establish criteria for eligibility, or defendants' discretion to make decisions on individual applications for temporary release. Despite appellants' characterization, the issue here is not eligibility decisions, but revocation of a previously conferred status.* As this Court has stated

* With only one exception, the cases appellants cite to demonstrate that there is no entitlement to due process in temporary release revocation were cases considering initial denials of applications for temporary release programs, not revocations of previously conferred benefits. See Lewis v. Oliver, 397 F.Supp. 1204 (E.D. Va. 1975); Sanno v. Preiser, 397 F.Supp. 560 (S.D.N.Y. 1975); Marquez v. Warden, 387 F. Supp. 565 (S.D.N.Y. 1974); Hale v. Davis, 387 F.Supp. 408 (W.D. Va. 1974).

(continued)

in the past, "[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." Bey, supra, 443 F.2d at 1086; see Morrissey, supra at 482 n. 8; Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1295-96 (1975).

The statutory amendments on which defendants seek to rely neither required nor authorized plaintiffs' removal from the temporary release program. Despite appellants' assertions, these amendments simply do not render plaintiffs ineligible for the program. In fact, under New York law, these amendments may not even be applied retroactively to persons already in the program. New York Statutes Law §52 (McKinney's 1971), see p.6 n.,supra.

(continued)

* The only exception, Durso v. Rowe, 430 F.Supp. 49 (N.D.Ill 1977) held that there is no predicate in Illinois law for finding a state-created right or justifiable expectation concerning temporary release. See id. at 51-52. The status of Illinois law is simply irrelevant to the question herein of whether defendants' laws, regulations, policies and practices create a justifiable expectation under New York law.

That the legislature may have the power to overcome plaintiffs' justifiable expectations by abolishing the temporary release program is irrelevant, because the legislature has not done so. The program continues to exist, and plaintiffs remain eligible to participate in it. The state's power to eliminate a program does not subsume the power to make arbitrary decisions in implementing the program while it remains in effect. The legislature presumably also has the power to abolish the parole system. Yet the Supreme Court in Morrissey, supra, found that the state may not terminate the parole status of a participant without due process. As long as the temporary release program does exist, and does allow the commissioner discretion to continue plaintiffs' participation in the program, the commissioner's discretion must be exercised consistently with "rules and understandings, promulgated and fostered by state officials" which have created an entitlement. See Perry v. Sindermann, supra at 602, pp.20-26 , supra.

The District Court has not usurped defendants' discretion by simply requiring them to honor commitments they themselves have made. That due process requires no less can be seen by analogizing plaintiffs' situation to that of parolees. As the Court found in Morrissey, supra,

parolees have been promised, implicitly, that their parole will not be revoked unless they have misbehaved. For that reason, the Court found that the determination of such misconduct was critical, and must be made in accordance with the requirements of due process. If, in response to merely procedural statutory amendments, the Parole Board suddenly revoked the parole of persons who had not misbehaved, it cannot be doubted that Morrissey would require, not just a hearing, but reinstatement of those individuals to parole. Hearings are necessary only when revocation is to be predicated on facts to be determined. Where there is no proper basis for revocation at all, hearings are not a necessary prerequisite to the restoration of benefits which were unconstitutionally revoked.*

C. Society's Interests

As defendants-appellants assert, society also has an interest in these decisions.

* The District Court's order of November 7, 1977, JA at 195, allows defendants the opportunity to hold hearings in any case where a permissible basis for revocation, such as misbehavior, or previously unavailable information about a participant's history, is alleged and factual determinations thereby are required. JA at 197, opinion at 2.

"The parolee [or temporary release participant] is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole [or temporary release status] revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole [or temporary release status]"

Morrissey, supra at 484. Further, "society has an interest in basic fairness which serves to enhance the chance of rehabilitation by avoiding adverse reaction to arbitrariness."

Ballay, supra at 655-56; see Morrissey, supra at 484.

Defendants-appellants attempt to justify and insulate their summary decisions by declaring that they have now decided that these plaintiffs may be dangerous, and that the Court may not take any action, regardless of what the Constitution might require, that might result in such "dangerous" persons being at liberty. The assertion that plaintiffs are too dangerous to participate in the temporary release program is rendered ludicrous by consideration of the facts of the case. First, defendants themselves decided that the release of each and every one of these plaintiffs was consistent with the safety of the community. See p.28 supra. Plaintiffs did nothing to cause defendants to reconsider those decisions. Plaintiffs have proved that they can successfully participate in the temporary release program: they have done so, and have not even been charged with any form of misbehavior.

Further, the long-term interest in the safety of the community is well-served by permitting inmates who are eligible for release on parole in the next few months to equip themselves for reentry into society by finding employment, making contacts outside of prison, and earning money to use for the initial costs entailed in release from prison. The question is not whether these individuals will be released from prison, but simply when and under what circumstances. Finally, the Parole Board obviously disagrees with defendants' conclusions about the dangerousness of these plaintiffs: available evidence indicates that most, if not all, of the members of the plaintiff class who have come before the Parole Board since August have already been released on parole.*

Thus, the balance of hardships consists, on the one hand, of clear, irreparable and constantly increasing injury being done to plaintiffs-appellees and, on the other, of nothing more than administrative burdens for defendants-appellants. The other purported interests appellants assert

* The Parole Board is required by statute to grant release on parole only after considering whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." N.Y. Executive Law §259-i(2)(c), as amended, July 7, 1977, N.Y. Sess. Laws 1977, ch. 904, §259-i(2)(c).

dissolve under scrutiny. It cannot be doubted that the District Court correctly assessed the relative weight of these interests in deciding to grant the preliminary injunction.

CONCLUSION

For the reasons stated, the District Court order granting plaintiffs-appellees a preliminary injunction should be affirmed.

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Respectfully submitted,

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